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June 23, 2006

Stewart Fairburn
City Administrator
120 E Main
Gardner, Kansas 66030

Re: BNSF Intermodal Facility:

Dear Mr. Fairburn:

As discussed this morning, my responses to your questions are designed to provide an overview. For simplicity, responses addressing Gardner's powers assume that Gardner will annex the involved property. If additional detail would be helpful, let me know.

1. The Surface Transportation Board (STB) does not treat construction and operation of intermodal facilities along pre-existing rail lines as subject to its jurisdiction under 49 U.S.C. § 10901. However, it and the courts have found such construction and operation to be subject to Federal preemption under 49 U.S.C. § 10501(b). Accordingly, Gardner faces a "regulatory gap" in which it may not exercise many of its own powers, nor may it turn to the STB for relief under federal law, including NEPA, to prevent or secure mitigation for construction of the BNSF intermodal facility.
2. Federal preemption over intermodal facilities does not extend to a number of construction-related matters, e.g., building codes that do not unreasonably interfere with or delay construction of the intermodal facility. It also may not extend to cover a number of "health, safety and welfare" ordinances not created or enforced for the purpose of unreasonably interfering with the railroad. The end-result may be determined by precisely what you wish to do. For example, in some limited instances, Federal Railroad Administration regulations limit your control over noise issues. Suffice it to say that there are a number of potential gray areas, e.g., Gardner's right to require BNSF to protect neighboring properties from the intermodal facility's high-intensity light during the night.

3. The preemption discussed above is limited to railroad activities. Again, there are gray areas. However, as a general rule of thumb, the issue turns on whether the activity is being conducted by the railroad or by a third party. If a third party is merely leasing land and/or buildings from the railroad and conducting warehousing/distribution operations, I would take the position that its activities are not subject to federal preemption and are subject to Kansas and Gardner laws and ordinances, e.g., those relating to zoning. Let me put a somewhat finer point to this. The issue is not the degree to which the warehousing/distribution services are provided to customers of rail services. Rather, it is whether the warehousing/distribution services are being provided by the railroad as ancillary to its transportation service or whether the warehousing/distribution services are performed by non-railroads. If those services are being provided by non-railroads, I believe you may prevent them, e.g., by use of zoning.

4. With one exception, I see no relationship between Gardner's refusing to permit non-railroads to conduct warehousing/distribution operations and the amount of land BNSF may purchase. If the railroad finds willing sellers, it may buy what it wishes to buy. In contrast, if the railroad must use condemnation rights under Kansas law, I assume that it may do so only for "railroad" purposes. I have not reviewed Kansas law on this subject. But, the condemnation statutes with which I am familiar would not permit a railroad to condemn property for a non-transportation purpose.

5. Your question as to whether "continuation" of warehousing/distribution services may be prevented is beyond my expertise. That is, I have no knowledge as to whether you may use zoning or other local powers to shut down an existing service just because, in the future, it will be used by a railroad customer.

6. I see no reason to believe that trucking operations associated with either the intermodal facility or the warehousing/distribution facilities are subject to the federal railroad-related preemption noted above.

7. The ownership of the land is not particularly significant. Both the preemption noted above for railroad activities and the lack of preemption over warehousing/distribution if performed by a non-railroad would be applicable regardless of who owns the property. The determinative questions are what operations are being conducted and what entity is conducting them. Note that this is the case whether or not the warehousing/distribution function is limited to services prior to or following railroad transportation.

8. You've asked (a) whether the City would be liable for a taking if it uses its zoning powers to prevent warehousing, (b) the ballpark cost of litigation that may result from that City action, and (c) the City's likelihood of success on the merits. These questions are outside my expertise.

9. Gardner's inability to "just say no" does not lead to the conclusion that Gardner has no ability to secure mitigation in negotiations with BNSF. Permitting the warehousing/distribution functions, not opposing the new interchange on the interstate,

±»and road construction have obvious values to BNSF and securing a quid pro quo may be possible.

Sincerely,

/s/

Steven J. Kalish

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